

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-218455.2

DATE: July 26, 1985

MATTER OF: Meridian House International--
Request for Reconsideration

DIGEST:

Prior decision, which held that an agency's request for proposals was inadequate to promote effective competition and resulted in a de facto sole-source award to the incumbent, is affirmed where the request for reconsideration fails to indicate that material errors of fact or of law exist in the prior decision to warrant its reversal or modification.

Meridian House International requests reconsideration of our decision in University Research Corp., B-216461, Feb. 19, 1985, 64 Comp. Gen. ___, 85-1 CPD ¶ 210, in which we sustained a protest by University Research Corporation (URC) alleging that the Agency for International Development (AID) had improperly awarded a 5-year contract to Meridian House, the incumbent, under request for proposals (RFP) No. ROD-NEB-84-10. Meridian House asserts that the decision was based upon an incomplete administrative record, and that we misapplied certain legal precedents in reaching our conclusion.^{1/} We affirm our prior decision.

Under the subject solicitation, the contractor was to provide a wide range of orientation and hospitality services for foreign visitors to the United States, many of whom are of high political and social status in their home countries. The services to be performed included greeting the visitors upon their arrival in the United States, arranging hotel reservations and transportation, conducting orientation programs and educational tours, arranging hospitality in American homes in the Washington, D.C., area, facilitating attendance at social and cultural events, and developing and publishing participant-oriented

^{1/} Meridian House did not participate in the original protest proceedings because of AID's failure to notify the organization of the protest. Accordingly, we have entertained the reconsideration request in order to afford Meridian House the opportunity to be heard in the matter. See Andrew Corp, et al., B-217024 et al., Mar. 25, 1985, 85-1 CPD ¶ 344.

materials. The contractor was required to be extremely flexible in providing the requisite services, due to the fact that the annual total of visitors was estimated to be 1200, arriving in weekly groups ranging from 1 or 2 individuals to 50 to 100 or more, with as little time as same-day notice given before arrivals.

Because of the past use by Meridian House of a large number of volunteers in providing many of the services^{2/}, all offerors under the RFP were required to have a qualified and trained volunteer staff in place at the time of award, and to demonstrate compliance with this requirement in their proposals. Furthermore, because of AID's concern that appropriate physical facilities that "reflect the dignity of this country" be utilized in performing the contract, all offerors were required to demonstrate in their proposals that their offered facilities would be suitable.

The RFP represented AID's effort to procure the services on a competitive basis for the first time, Meridian House having been the sole-source contractor under the previous 5-year contract.^{3/} In our prior decision, we did not accept URC's assertion that the RFP was consciously structured in such a manner that only Meridian House was afforded a realistic opportunity to receive the award. Rather, we concluded that more effective competition could have been obtained through better solicitation draftsmanship.

We found that the RFP did not adequately set forth AID's requirements as to the number and content of the orientation programs the contractor was required to conduct, and did not sufficiently detail what was meant by "specific" programs and "special" groups. Furthermore, we found that the RFP failed to indicate clearly the nature, quality, and quantity of the participant-oriented publications required from the contractor. Because of these defects, and because no other proposals had been received, we concluded that there was an unacceptable level of uncertainty and risk present in the solicitation.

^{2/} Meridian House is a nonprofit organization and has apparently retained a dedicated body of volunteers over the years.

^{3/} In January of 1984, nearly 8 months prior to issuing the RFP, AID published a notice of its future intent to issue an RFP in the Commerce Business Daily, (CBD) and requested capability statements from interested offerors. URC and five other firms submitted such statements and were issued copies of the RFP.

In addition, we agreed with URC that the RFP's requirements that offerors have physical facilities and a qualified and trained volunteer staff in place at the time of award, and that offerors demonstrate compliance with these requirements in their proposals, unduly restricted competition. From the record before us, it was apparent that only Meridian House could have met these requirements upon proposal submission by virtue of its incumbency, and that it would have been especially burdensome for other offerors to do so given the 30-day response period in the RFP. We concluded that it would have been more appropriate for the solicitation to provide a specific period of time between the date of selection for award and the effective date of the contract for the successful offeror to obtain the requisite facilities and provide for a qualified and trained body of volunteers.

Request for Reconsideration and GAO Analysis

Meridian House urges that our prior decision is erroneous both as to matters of fact and of law. On the first point, the organization asserts that AID's administrative report on the protest failed to fully indicate the unique nature of the services being acquired. Meridian House contends that we erred in concluding that the RFP was inadequately detailed. According to Meridian House, because the size of the visiting groups, and the particular national, political, and cultural characteristics of the arriving visitors will always differ, AID could not have known the precise nature and content of the various programs, seminars, and publications required from the contractor, and could not, therefore, have described these aspects of performance in any greater detail.

From a legal standpoint, Meridian House does not accept our conclusion that the fact that no other proposals were received indicates that the level of uncertainty and risk in the solicitation was unacceptable. Meridian House contends that a more plausible explanation for the lack of competition was that other firms realized that they did not have the capability and flexibility to meet the agency's needs, and, accordingly, that they could not effectively compete. In this regard, Meridian House asserts that, because of the special nature of AID's requirements, the contemplated contract did not hold any significant appeal for commercial firms.

Meridian House also argues that we erred in concluding that the RFP's requirements that facilities and volunteer staff be in place at the time of award unduly restricted competition. Meridian House contends that potential offerors had a lengthy period of time between the CBD notice and the closing date for receipt of proposals to make suitable arrangements, and that prudent business practice would have dictated that offerors make arrangements contingent upon the award of the contract for the provision of both facilities and volunteers. Meridian House asserts that URC's protest as to the allegedly restrictive nature of these requirements is really an admission that the firm was unable to meet the agency's minimum needs, and that URC had ample opportunity to enter into joint venture or subcontracting arrangements with other organizations with the institutional capability to meet those needs.

We have carefully reviewed the record in this matter, and we have entertained AID's comments on Meridian House's request for reconsideration.^{4/} We find no basis to conclude that our prior decision contains errors of fact or of law so as to require its reversal or modification.

(1) Specification Inadequacy

As stated in our prior decision, we recognize the unique nature of the services being acquired and AID's need for a great degree of flexibility from the contractor. However, we remain of the view that more effective competition could have been achieved if the RFP had been structured in a more appropriate format.

With regard to the issue of specification inadequacy, we think that AID should have provided representative data from the previous 5-year period of performance to indicate what was required from the contractor. Without such

^{4/} We note here that AID has never requested reconsideration of the original decision. Because we have granted Meridian House a rehearing, we have also accepted AID's comments. As a general rule, however, we will not consider newly presented arguments by an agency where the agency failed to present such arguments in its report on the protest, and the information which forms the basis for the arguments was available at that time. See Griffin-Space Services Co.--Reconsideration, 64 Comp. Gen. 64 (1984), 84-2 CPD ¶ 528; Swan Industries--Request for Reconsideration, B-218484.2 et al., May 17, 1985, 85-1 CPD ¶ 569.

information, a specification like the one in the RFP, requiring the contractor to conduct "seminars or other specific programs for special groups, several hours or days in length," can only be construed as so indefinite as to preclude intelligent proposal preparation. Although we accept Meridian House's statement that the present contract would probably require services to foreign visitors of different national origins and needs than those encountered in the past, past contract data would not necessarily have been misleading, but rather could have served to provide a general framework for proposal preparation. Similarly, the RFP should have described the participant-oriented publications that Meridian House was currently furnishing, rather than placing the burden upon prospective offerors to obtain copies of such publications from Meridian House.

Furthermore, we do not agree with Meridian House's contention that we legally erred in applying our decision in Memorex Corp., B-212660, Feb. 7, 1984, 84-1 CPD ¶ 153, to the facts of this case. In Memorex, the protester had contended that the performance specifications contained far too little detail to define the agency's needs. Upon analysis, we concluded that the solicitation's mandatory requirements clearly stated the required capability and characteristics of the requested equipment, and, therefore, that the protester's contrary assertion was without merit. Furthermore, the fact that five proposals had been received in response to the RFP led us to believe that the level of uncertainty and risk in the solicitation was acceptable.

Conversely, in this matter, we concluded upon analysis that certain aspects of the solicitation were too general and vague to allow for effective competition. As already indicated, we did not accept the argument that AID could not have defined certain requirements with greater precision. In essence, because of the long history of prior performance, both AID and Meridian House knew what was expected from the contractor; however, the RFP as drafted was not an adequate vehicle to impart that knowledge to other prospective offerors. We believe this view is supported by the fact that only Meridian House submitted a proposal in response to the RFP, while URC and five other firms had earlier furnished capability statements to AID and had been issued copies of the solicitation. Clearly, the proposition stated in Memorex is consistent with this conclusion.

To the extent that Meridian House contends that a more plausible explanation for the lack of competition is that the contemplated contract held little appeal for commercial firms, this argument is refuted by the fact that URC is indeed a commercial firm, and its great interest in the contract is shown by its diligent pursuit of the protest. On this same issue, AID contends that we erred in discounting its assertion that another prospective offeror found no fault with the specifications, but rather did not compete because it had reduced its Washington, D.C., staff. In fact, we did not discount this assertion, but found it unpersuasive, since the agency had not provided sufficient support for the contention. Therefore, we could not give this contrary explanation any significant weight.

(2) Solicitation Restrictiveness

We believe that both Meridian House and AID have misconstrued the basis for our conclusion that the requirement for facilities and volunteer staff to be in place at the time of award was unduly restrictive. Given the sensitive foreign relations aspects of this procurement, we have never disputed AID's justification for requiring that physical facilities be appropriate for performing the services, and that the requisite volunteer staff be composed of qualified and trained individuals. However, we continue to believe that it would have been clearly less restrictive of competition for the solicitation to have provided the successful offeror with a phase-in period to meet these requirements.

As indicated in our prior decision, this approach would have allowed the uninterrupted furnishing of services until the successful offeror became fully operational, without additional cost to the government. To the extent that Meridian House disputes the legality of such a transition period, we find no basis for the organization's position. It is not unusual for contracting agencies to request an incumbent contractor to extend its contract beyond the specified term of performance for various reasons. In any event, this procurement approach presupposes that the agency would structure the solicitation so that the effective date of the successor contract at the end of the phase-in period would coincide with the expiration date of the existing contract.

Although Meridian House and AID argue that URC could have entered into contingent arrangements for facilities and volunteer staff prior to the proposal closing date, URC's own experience indicates otherwise. The firm states that it was not possible to get a commitment for space without a substantial initial expenditure, and that it would have been economically prohibitive to equip the facility and hire staff merely in expectation of an award. We believe this is a reasonable objection to the RFP's requirement that facilities be in place at the time of proposal submission. With respect to the requisite volunteers, URC stresses that it in fact attempted to work through a number of local organizations, such as international voluntary services and civic and professional associations, to recruit volunteers, but that it was impossible to obtain firm commitments from these organizations in the absence of a contract award.

We do not accept the argument that prospective offerors necessarily had a long period of time to make contingent arrangements. In our view, the procurement came into being when AID issued the RFP, not when it published the CBD notice. We seriously doubt that sufficient contingent arrangements could have been entered into merely on the basis of the CBD notice, or that it would have been prudent for prospective offerors to act directly upon that notice alone.

We remain of the view that the RFP should have provided for a phase-in period between the date of selection for award and the effective date of the contract. If the successful offeror's facilities and volunteer staff were not in place and acceptable at the end of that period, the firm could be found nonresponsible to perform the contract, and no award would ensue. See the Federal Acquisition Regulation, 48 C.F.R. § 9.103 (1984).

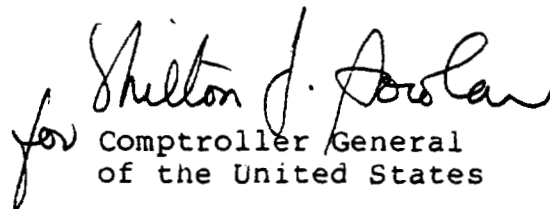
In any event, we find no evidence in the record to establish that URC, as a commercial firm, would not have been able to obtain appropriate facilities and a qualified volunteer staff, had the RFP provided a less burdensome vehicle for prospective offerors to meet these requirements. See Environmental Protection Agency sole-source procurements, 54 Comp. Gen. 58 (1974), 74-2 CPD ¶ 59. Although Meridian House contends that its volunteers would

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have declined to offer their services to a commercial firm such as URC if it had been the successful offeror, we do not believe this argument supports the use of restrictive specifications. Further, we question whether the volunteers in fact are motivated more by their loyalty to a particular organization than by their dedication to the foreign visitor programs.

AID now informs us that only one other offeror besides Meridian House was judged to be capable on the basis of the informational statements submitted in response to the CBD notice. AID states that URC was not considered to be capable, apparently because it was a commercial firm and not a nonprofit organization similar to Meridian House with an established corps of volunteers. However, we do not believe this point to be material to our reconsideration. The fact is that URC was issued a copy of the solicitation, and neither the CBD notice nor the RFP indicated that a prospective offeror had to be a nonprofit organization with a volunteer staff already on hand. Rather, the only requirement was that offerors be able to attract and maintain a sufficient number of qualified volunteers to perform the services. We find no support for a conclusion that only nonprofit organizations are capable of doing so.

After careful reconsideration, we find no basis to reverse or modify our February 19 decision. Accordingly, that decision, with its recommendation that corrective action be taken, is affirmed.


for Comptroller General
of the United States